

1249/99(F)

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

Horanekara Gedera Wimalasena
No.80, Kadewatta, Ariyagama,
Pallepola.

Plaintiff-Appellant

C.A.Case No:- 1249/99(F)

D.C. Matale Case No:-1889/P

V.

- 1.Menikdurayala Gedera Bodi
 - 2.Menikdurayala Gedera Komali
 - 3.Menikdurayala Gedera Dharmadasa
 - 4.Menikdurayala Gedera Amarawathi
 - 5.Menikdurayala Gedera Piyadasa
- All of Ariyagama, Pallepola.

Defendant-Respondents

Before:- H.N.J.Perera, J.

**Counsel:-Viran Fernando with Asanka Ranwala for the plaintiff-
Appellant**

Isuru Somadasa for the 4th defendant-Respondent

Argued On:-27.03.2014

Written Submissions:-13.06.2014

Decided On:-15.05.2015

H.N.J.Perera, J.

The plaintiff-appellant instituted action in the District Court of Matale seeking to partition a paddy field called Pudaludeniya Moragahamulla described in the schedule to the plaint. Accordingly a commission was issued to licensed surveyor S.Ranchagoda to survey the corpus. Accordingly a plan was prepared bearing No 2405 dated 11.01.1990 which identified the land as consisting of five lots depicted as lots 1,2,3,4 and 5 in the said plan.

The 4th defendant-respondent took up the position that lot 1 depicted in the said plan marked X at the trial was a separate bare land and not a part of the paddy field described in the schedule to the plaint. Therefore at the trial the main issue was on the identification of the corpus and as to whether the aforesaid lot 1 was part of the subject matter of the action or not. The learned trial Judge by his judgment dated 22nd January 1999 entered judgment excluding lot 1 from the corpus of the action and partitioning the remainder in accordance with the devolution of title pleaded in the plaint. Aggrieved by the said judgment of the learned District Judge dated 22.01.1999 the plaintiff-appellant has preferred this appeal to this court.

The 4th defendant-respondent took up the position that lot 1 in the preliminary plan constituted a separate land called "Bagawagallene Hena alias Durakame Hena" for which the 4th defendant-respondent claimed independent title.

It has been the practise of the courts to exclude a separate land wrongly included by a plaintiff as being part of the corpus of the

partition case. In C.N.Hevavitharana V. Themis De Silva & others 63 N.L.R.68 it was held:-

“In an action instituted under section 2 of the Partition Act to partition land the Court has inherent power, under section 839 of the Civil Procedure Code, to make an order excluding a separate or divided lot or land which has been wrongly included by the plaintiff as being part of the corpus”

The learned District Judge has greatly relied on the Surveyor S.Ranchagoda' evidence which concluded that upon superimposition lot 145 of the Surveyor General's Village Plan and lot 1 of the Preliminary plan marked X it was found that major portion of the lot 145 was included in the said lot 1 of the Preliminary Plan.

The Surveyor has very categorically stated that there is no doubt that lot 145 in Plan 62 is included in lot 1 in Plan X. He has also very clearly stated to court that lot 145 in plan 62 is of 1 Roods and 23 Perches in extent. And lot 1 in Plan X is of 2 Roods and 1 Perches. Therefore it is very clear that the said lot 1 in Plan X contained very much more than the extent in lot 145 in plan 62.

Therefore it is very clear from the evidence led at the trial in this case that only that part of the land which is part of the lot 145 in plan 62 included in lot 1 could be excluded from the lot 1 in plan X on the application of the 4th defendant-respondent. Although the Surveyor has stated that a major portion of lot 145 in plan 62 is included in lot 1 in plan X, he has not proceeded to demarcate and identify and to state the extent of the said portion in plan X.

The report of the Surveyor clearly states that a large portion of lot 1 depicted in his plan bearing No.1405 marked X falls in to lot 145 of the village plan No.62. Thus it is clear that lot 145 of the village plan

bearing No. 62 is smaller than lot 1 of plan X and only a large portion of lot 1 of plan X falls into lot 145 of the village plan bearing No. 62.

From the evidence led by the 4th defendant-respondent in this case it has been clearly established that the entirety of lot 1 in plan X is not a part of the land claimed by the 4th defendant-respondent as Durakamewatta, Bagawagallene Idama.

But the learned District Judge in his judgment has proceeded to exclude the entirety of lot 1 in plan X from the corpus. The Surveyor should have proceeded to identify and demarcate the exact portion that is said to be the part of lot 145 of plan 62 in the said lot 1.

Therefore this court cannot agree with the contention of the Counsel for the 4th defendant-respondent that the Surveyor's evidence corroborates the fact that lot 1 in plan X does not form part of the corpus but is consistent with the land of the 4th defendant-respondent.

This brings us to the question whether in fact the corpus was properly identified by the plaintiff-appellant in this case.

In *G.A.D.P.De S.Jayasuriya V. A.M.Ubaid* 61 N.L.R 353 Sansoni, J. Observed that "there is no question that there was a duty cast on the judge to satisfy himself as to identity of the land sought to be partitioned , and for this purpose it was always open to him to call for further evidence in order to make proper investigation."

Issue No 6 raised on behalf of the 4th defendant-respondent was on the basis that the 4th defendant has become the owner of lot 1 as pleaded in paragraph 5 to 9 in her statement of claim. The learned District Judge has concluded that the said deeds marked on behalf of the 4th defendant-respondent 4V1 to 4V4 , sufficiently proves the 4th defendant's title to the said lot .Deeds 4V2 to 4V4 relates to a land in

extent of 1 Rood and 23 Perches to a land very much less in extent than lot 1. In this case the learned District Judge has in detail considered the 4th defendant-respondent's title to the said land.

In C.N.Hevavitharana N. S. Themis De Silva, it was further held that the Court has no power to deal with the separate lot also and to declare in the interlocutory decree the person, who proves title to it, as the owner.

Unlike the judgments in other cases, the judgments in partition actions bind not only the parties to the action, but also the whole world. Therefore the trial Judges in partition actions are burdened with severe responsibility in investigating the title of parties.

In view of the above reasons I would allow the appeal of the plaintiff-appellant and set aside the judgment of the learned District Judge dated 22.01.1999 and direct a trial de novo. The learned District Judge of Matale is directed to hear and conclude this action as expeditiously as possible. I make no order as to costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL